sity seems at first view to be greater than it really is upon closer examination. But we are fully satisfied with the construction now given, and though we entertain very great respect for decisions of other states, we cannot yield to them an authority any further than they are sustained in our judgment by sound reason and settled principles. For the errors in law above indicated in the charge of the Court below, we reverse the judgment in this case, and remand the cause for a new trial, on the principles laid down in this opinion.

RECENT ENGLISH DECISION.

Court of Queen's Bench, June 18, 1852.

MARDALL *v.* THELLUSON AND ANOTHER, EXECUTORS OF WILLIAM THEOBALD, DECEASED.

1. A debt due to the Defendant as Executor, for money had and received after the death of the Testator, may be set off against a debt due from the Defendant as Executor, which become due from the Testator before his death.
2. Judgment may be moved for non obstante veredicto on a plea of set-off.

Assumpsit against the executors of William Theobald. The first three counts were for work and labor, and for money paid in the lifetime of William Theobald, and upon an account stated with William Theobald in his lifetime. The fourth count was a special count upon a contract made by William Theobald, to hire the plaintiff as servant. The last count was upon an account stated with the defendants as executors. The defendants pleaded (among other pleas) non assumpserunt to the whole declaration; and to the first, second, third, and last counts, a set-off of money had and received for the use of the defendants as executors, and of money due upon an account stated with the defendants as executors. On the trial, before Lord Campbell, C. J., at the Sittings in Middlesex, after Hilary Term, 1852, it was contended for the defendants that there was no evidence to go to the Jury to support the contract stated in the fourth count. The Lord Chief Justice left the evi-

dence to the jury, who gave a verdict for the plaintiff on that count; and the set-off being proved, he directed a verdict to be entered for the defendants on the other counts, leave being reserved to move to enter a verdict for the defendants on the fourth count. In the following Easter Term, (April 16),

Humfrey obtained a rule nisi accordingly; and, (April 21),

Shee, Serjt., moved for a cross rule for a new trial on the ground of misdirection, or to enter judgment for the plaintiff, upon the issue on the plea of set-off, non obstante veredicto. [He cited *Hutchinson* v. *Sturges*, (Willes, 264); *Shipman* v. *Thompson*, (Id. 103); *Scholefield* v. *Corbett*, (6 Nev. & M. 527); *Blakesley* v. *Smallwood*, (8 Q. B. 538; 10 Jur. 470); *Houston* v. *Robertson*, (4 Camp. 342); and *Rogerson* v. *Ladbroke*, (1 Bing. 93).] *Cur adv. vult.*

On a subsequent day, (April 27,) the Court granted a rule nisi.

In this term, (May 22,) the Court,[1] after hearing *Ogle*, who showed cause against the rule obtained to enter a verdict for the defendants on the fourth count, and without hearing *Channell*, Serjt., and *C. W. Wood*, contra, made the rule absolute.—*Rule absolute to enter verdict for defendants on the fourth count.*

Channell, Serjt., and *C. W. Wood* then showed cause against the rule obtained on behalf of the plaintiff.—First, in order to entitle the plaintiff to judgment non obstante veredicto, the plea must be in confession and avoidance. (Steph. Plead. 107, 5th ed.) Admitting that it must be considered as if it was the only plea on the record, a plea of set-off is not in confession and avoidance. [*Lord Campbell, C. J.*—The plea must be considered as if the verdict was entered for the plaintiff on the other counts. The plea of set-off involves a confession of the plaintiff's cause of action.] Secondly, the plea is good. The plaintiff sues the defendants as executors, and they may therefore set off a debt from him to them in that capacity; and they would be mutual debts, because they would be assets. (Fortescue, B., in *Shipman* v. *Thompson*, Willes

[1] Lord Campbell, C. J., Coleridge, Erle, and Crompton, JJ.

103, 106, note (*a*)). In an action by an executor to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator. (2 Wms. Exors. 1596, 4th ed. pt. 5, b. 1, c. 1; note (a) to *Hutchinson* v. *Sturges*, Willes, 264; *Scholefield* v. *Corbett*, 6 Nev. & M. 527). But that rule does not apply to actions against executors. (*Blakesley* v. *Smallwood*, 8 Q. B. 538; 10 Jur. 470; where the Court did not adhere to the words of stat. 2 Geo. 2, c. 22, s. 13.) If a set-off were allowed in an action by executors, it would interfere with the distribution of assets; but that would not be the case in an action against executors.

Ogle, contra.—The plea does not allege that the plaintiff was indebted to the testator, but to the defendants as executors; whereas the declaration alleges that the testator was indebted to the plaintiff; therefore the debts are not mutual within sect. 13 of stat. 2 Geo. 2, c. 22, which gives the right of set-off, "if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party." If the executors had sued in respect of this debt, they might have declared either as executors or in their own right; and if they had sued in their own right, the present plaintiff could not have set off the debt due from the testator, partly on the ground of the interference with the distribution of the assets, but mainly on the ground that the right of set-off depends wholly upon the statute. *Cur. adv. vult.*

Lord Campbell, C. J., now delivered the judgment of the Court. Upon a rule for judgment non obstante veredicto, the question is raised, whether a debt due to the defendants as executors, for money had and received after the death of the testator, can be set off against a debt due from the defendants as executors, having become due from the testator before his death.

The stat. 2 Geo. 2, c. 22, gives the right of set-off where there are mutual debts between the plaintiff and the defendant; and the debts above mentioned are comprised in these words, they being mutual and due in the same right between the plaintiff and the defendant. Although the second clause, authorizing, in the case of

a suit by or against an executor, the set-off of a debt due from the testator, does not apply, we think that clause was not intended to restrict the operation of that which preceded. This construction was adopted in *Blakesley* v. *Smallwood*, (8 Q. B, 540; 10 Jur. 470), and a set-off of a debt from the plaintiff to the testator was allowed against a count upon an account stated by the executor with the plaintiff. Against this view the plaintiff contended, that such a set-off had been held illegal in *Shipman* v. *Thompson*, (Willes, 103,) and the cases referred to in note (a) to *Hutchinson* v. *Sturges*, (Id. 264). But, upon examination, these authorities do not appear to support the position contended for. In *Shipman* v. *Thompson*, the plaintiff sued for money due to the testator, received by the defendant after his death, and the defendant attempted to set off a debt due from the testator before his death; so that the question appears the same, the parties being reversed. But the plaintiff in that case sued in his own right, and not as executor; this he had the option of doing in respect of money received after the death; and as he was suing in his own right, a debt due to the testator was not a mutual debt within either clause of the statute. In respect of such a debt the executor may sue in either capacity, and by suing in his own right, and so preventing the set-off, he prevents a creditor from interfering with the distribution of assets; while, on the other hand, if, when sued as executor for a debt due before the death, he is allowed to elect to treat a debt accruing after the death as due to him as executor, the same mischief is prevented. A plaintiff, while wrongfully withholding assets equal to the debt he claims, ought not to be allowed to take from the assets a further amount in payment of that debt, and force the executor to the risk and waste of another action for the assets so wrongfully withheld, instead of making a set-off in the first action.—*Rule to enter judgment for plaintiff non obstante veredicto discharged.*